

September 16, 2010

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Re: Notice of ex parte presentations; Schools and Libraries Universal Service Support Mechanisms; Notice of Proposed Rulemaking: CC Docket No. 02-6; A National Broadband Plan for Our Future; GN Docket No. 09-51

Dear Ms. Dortch:

On September 15, 2010, Grace Koh, Policy Counsel, Cox Enterprises, Inc., Jose Jimenez, Executive Director of Regulatory Policy, Cox Communications, Inc. (by phone) along with Chuck Keller, Wilkinson Barker Knauer, met with Christine Kurth, Policy Director and Legal Counsel to Commissioner McDowell. They, along with Sandy Wilson, Vice President, Public Policy and Regulatory Affairs, Cox Enterprises, Inc., also met with Christi Shewman, Legal Advisor for Wireline and Universal Service to Commissioner Baker.

On September 16, 2010, prior to the release of the Sunshine agenda, Sandy Wilson, Grace Koh, and (by phone) Jose Jimenez and Jennifer Hightower, Vice President, Regulatory Affairs, Cox Communications, Inc., along with Barry Ohlson, Wilkinson Barker Knauer, met with Angie Kronenberg, Acting Chief of Staff and Wireline Legal Advisor to Commissioner Clyburn. On the same day, Sandy Wilson, Grace Koh, Chuck Keller, and (by phone) Jose Jimenez met with Zachary Katz, Legal Advisor for Wireline Communications, International and Internet Issues to Chairman Genachowski and Patrick Halley, Gina Spade, Regina Brown, and James Bachtell from the Wireline Competition Bureau.

All of the meetings focused on the proposal in the E-Rate NPRM to add dark fiber to the enhanced services list ("ESL").<sup>1</sup> During the meetings, Cox raised issues consistent with the

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<sup>1</sup> *Schools and Libraries Universal Service Support Mechanisms; A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Notice of Proposed Rulemaking, FCC 10-83 (rel. May 20, 2010) ("E-Rate NPRM").

discussion below and with the positions offered by the National Cable & Telecommunications Association in comments filed in the proceeding on July 9, 2010.<sup>2</sup>

### **Discussion**

Cox is a full service provider of telecommunications products, including advanced digital video programming services, local and long-distance telephone services, high-speed Internet access and commercial voice and data services. Cox is proud to have been involved with the E-Rate program since its inception in 1998 and to provide a competitive service option to many schools and libraries in its service territory.

Cox is concerned that the Commission's proposal to extend E-Rate funding to the leasing of dark fiber from non-telecommunications carriers raises legal, administrative, and competitive issues.<sup>3</sup> Leasing dark fiber is just one component of providing high-quality telecommunications and advanced services to schools and libraries. Expanding E-Rate funding to support dark fiber leasing creates a risk that schools and libraries soliciting services will receive bids that fail to account for the additional costs associated with dark fiber – such as the equipment to light the fiber, equipment upgrades, maintenance, repairs, monitoring, etc. Such a situation could undermine the bidding process and possibly drive up the need for further E-Rate subsidies at the expense of other Priority 1 uses of E-Rate funding. In addition, state and municipal dark fiber providers are often affiliated with the same public school districts that procure broadband service and high-capacity circuits through E-Rate. Because state and municipal broadband providers have access to benefits such as funding from stimulus grants and loans, tax relief, tax revenues, below-cost loans, and sometimes more favorable access to poles and rights-of-way, their active presence in the dark fiber market could distort the competitive landscape in the market, to the ultimate disadvantage of E-Rate recipients.

Cox thus urges the Commission to seek further comment on how to address these concerns and to adopt rules allowing E-Rate support for dark fiber only when and if the Commission has the information necessary to ensure the smooth transition of dark fiber to the ESL. The existence of unresolved issues demonstrates that the dark fiber proposal is not yet ripe to be included in the E-Rate rules. If the Commission nonetheless decides to permit E-Rate applicants to receive support for dark fiber, Cox urges the Commission to implement such support only on a limited trial or pilot basis, with a restricted amount of funding available for such support and a time limit. The Commission then could commit to assessing the program

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<sup>2</sup> See, e.g., Comments of National Cable & Telecommunications Association at 4, CC Docket No. 02-6, GN Docket No. 09-51 (filed July 9, 2010) (“If the Commission nevertheless decides to add leased dark fiber to the list of supported services, it should include protections to ensure that the program is only supporting dark fiber where it is the most cost effective approach and where the school system can demonstrate that it has the resources and expertise to operate the facilities over the long term.”).

<sup>3</sup> E-Rate NPRM at ¶¶ 53-55.

prior to the end of the trial period to determine whether support should continue and, if so, under what conditions.

In addition, any decision to expand E-Rate support to include dark fiber should be accompanied by carefully crafted safeguards to ensure the integrity of the program. Specifically, Cox recommends the following minimum safeguards:

- *Technology Plans.* The Commission's rules for technology plans<sup>4</sup> should be revised to include explicit requirements that applicants demonstrate that they have (1) sufficient funding to purchase the necessary electronics to light any dark fiber purchased; (2) current staff with the qualification and training to light, operate, and maintain fiber networks; (3) plans for staff development and training to ensure that staff remain current on technical skills necessary to operate the fiber network; and (4) plans to ensure that the dark fiber facilities, once lit, will provide robust network protections (e.g., cybersecurity, redundancy, and survivability) comparable to those provided by commercial broadband networks.
- *Competitive Bidding.* The rules must emphasize that the competitive bidding rules<sup>5</sup> apply to any applicant wishing to select dark fiber – irrespective of the entity proposing to provide the dark fiber.
- *Conflict of Interest.* The rules must emphasize that the prohibition against conflicts of interest between bidders and service providers applies to applicants proposing to select dark fiber. In the NPRM, the Commission proposes to codify its well-developed conflict-of-interest jurisprudence into its rules,<sup>6</sup> and it must do so if it also wishes to adopt any form of the dark fiber proposal. Most importantly, the rules must make clear that the following requirements apply to any contract for dark fiber:<sup>7</sup>
  - An applicant may not have a relationship with a dark fiber provider that would unfairly influence the outcome of a competition or would furnish the service provider with “inside” information.
  - Applicant employees or board members may not serve on any board of any type of dark fiber provider that participates in the E-Rate program in the same state.

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<sup>4</sup> 47 C.F.R. § 54.508.

<sup>5</sup> 47 C.F.R. § 54.504. *See also* E-Rate NPRM at ¶ 27 & n.47, App. A (proposing to add a new § 54.510 to the Commission's rules to specify competitive bidding requirements).

<sup>6</sup> *Id.* at ¶¶ 26-31.

<sup>7</sup> *See id.* at ¶¶ 29-30.

- An applicant cannot list a dark fiber provider representative as the FCC Form 470 contact person and allow that dark fiber provider to participate in the competitive bidding process.
- *Cost-Effective Solution.* The rules must make clear that schools may only select dark fiber “when that is the most cost-effective solution to their connectivity needs.”<sup>8</sup> Applicants should be required to demonstrate that leasing dark fiber is more cost-effective than purchasing a comparable finished telecommunications service that would meet the applicant’s connectivity needs. This would include, at minimum, the following requirements:
  - An applicant’s Form 470 Description of Services Requested should not be permitted to specify that the applicant is seeking dark fiber only. Rather, the Form 470 may properly specify that the school is seeking connectivity with a certain capacity, and could note that the applicant will consider proposals including either broadband services or dark fiber. In this way, the Commission can ensure that applicants can rationally compare dark fiber proposals with proposals involving finished broadband services.
  - An applicant ordering dark fiber should be required to document, in its Form 471 Services Ordered, how it determined that a dark fiber proposal was more cost-effective than a finished telecommunications service proposal. This demonstration should include a comparison of the price of any finished telecommunications proposal versus the sum of the price of the dark fiber lease plus the cost of electronics to light the fiber, the additional cost of training and personnel to operate and maintain the fiber for the term of the lease, and the cost of ensuring that the applicant’s fiber network redundancy, survivability and back-up power provisions comparable to those available from commercial broadband networks reflecting acceptable, current industry practices, including any requirements the Commission may adopt in this area.

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<sup>8</sup> *Id.* at ¶ 54. *See also* 47 C.F.R. §§ 54.504(b)(2)(viii), 54.504(c)(1)(xi) (applicants must solicit and select “the most cost-effective bid for services or equipment ... with price being the primary factor considered, [that is] the most cost-effective means of meeting educational needs and technology plans.”)

WILKINSON ) BARKER ) KNAUER ) LLP

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We hope that the Commission finds the above suggestions useful as it considers if, and under what conditions, dark fiber should be added to the ESL. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed with your office via ECFS. Courtesy copies also are being distributed to the meeting attendees via email. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

/s/  
L. Charles Keller

cc: Zachary Katz  
Christine Kurth  
Angie Kronenberg  
Christi Shewman  
Patrick Halley  
Gina Spade  
Regina Brown  
James Bachtell